United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7379

ORIGINAL

To be argued by
RAPHAEL P. KOENIG

In The

United States Court of Appeals

For The Second Circuit

SILVER CREATIONS, LTD.,

Appellee,

vs.

CLASSIC MASTERPIECES, a subsidiary of STONE FILMS INTERNATIONAL, INC.,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT

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CASES CITED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SILVER CREATIONS, LTD.,

Appellee,

-against-

CLASSIC MASTERPIECES, a Subsidiary
Of STONE FILMS INTERNATIONAL, INC.,

Appellant.

BRIEF ON BEHALF OF APPELLANT

Statement

This is an appeal from a judgment of the United States District Court, Southern District of New York (Owen J.) The judgment against the sole defendant, CLASSIC MASTERPIECES, is in the sum of $61,300.00 with interest thereon at the rate of six (6%) percent from July 8, 1974. A trial, without jury, was held on April 14 and April 15 of 1975 and occupied a portion of each day. Subsequent to the entry of judgment a motion was made for an order pursuant to Rule 59 of the Federal Rules of Civil Procedure for a new trial. Said motion was denied on May 30, 1975.

The action was for alleged breach of contract whereby defendant agreed to purchase fifty replicas of a certain Napoleonic coach for the sum of $80,000.00. Defendant had advanced the sum of $13,000 towards the contract price and counterclaimed for loss of sales and failure to return said deposit, claiming damages of $61,000.

The issue of validity of the contract and the question of an agreement that time was of the essence is not the basis of this appeal.

THE FACTS

There are two issues raised by this appeal and are based on the following facts.

The case was assigned to Judge Owen for trial and the summons and complaint on which it is based were duly filed on September 5, 1974. Various proceedings were had before Magistrate Raby and the case was transmitted to Judge Owen for trial.

By letter dated March 17, 1975, a copy of which was mailed to counsel for the Appellant, Charles Souvel, an attorney for the Appellee requested a prompt trial and stated in that letter the following:

"The plaintiff, SILVER CREATIONS, LTD., is a small company. At the present time, it is in dire financial straits and its ability to pay its creditors and to remain in business depends, in large part, on whether or not it will be successful in this claim. If the trial of this action is delayed, there is a reasonable probability that SILVER CREATIONS will be forced into bankruptcy because of its inability

to pay its creditors. Under these circumstances, justice delayed will be justice denied."

Without ascertaining the truth of the statement of the lawyer and without ordering a conference with defendants counsel, the case was ordered to trial on March 28, 1975. Notification was through the judge's law assistant. Upon protest that the date was Good Friday, the matter was re-scheduled for April 14, 1975. A motion was made seeking to have Judge Owen disqualify himself. On April 7, 1975, Judge Owen decided the application and stated, "Treating this as a motion to recuse, in my judgment it is frivolous and is hereby denied." The memorandum was filed on April 8, 1975 and counsel was notified by postcard two days later.

When the case was called for trial counsel for the defendant, Appellant made an application to adjourn the case from Monday to Thursday so that his witnesses could appear. The Court stated that the trial of the case would start and that the testimony of JANICE STONE would be received on Wednesday or Thursday (JA17). He further stated that "She can't be more than an hour or two of testimony from what I gather. When she arrives we will take her. (JA 18)

The application was opposed by counsel for the plaintiff-appellee who advanced the reason that the President of the plaintiff was leaving for Europe on Wednesday and while he would not be a witness on the direct case, his testimony might be required after the cross examination of the defendant (JA 18). Consequently, the application was denied

(JA 22) and counsel was informed that he had until the next morning to produce his witness. (JA 23).

The trial accordingly commenced and the witness, RICHARD MOSKOW , testified for the plaintiff-appellee (JA 26-JA 72). At the conclusion of his testimony the court stated: "We will recess until tomorrow morning. At that point, you will either go forward with the Stones, use their depositions or the case will otherwise terminate." (JA 72).

The next morning counsel for the defendant-appellant advised the court that his witnesses were not present and renewed his motions. (JA 74). He requested that an inquiry should be made as to the duration of Mr. Friedman's trip and stated that he was willing to await his return and would furnish the Judge with a transcript of the testimony in that event (JA 74). The request was refused and the court advised counsel he could read any part of the Stone's depositions for his consideration on the merits(JA 86). Without waiving any rights which the defendant-appellant might have, the depositions were submitted (JA 86).

Upon the conclusion of the reading of the depositions both sides moved for judgment. The court recessed and made findings of fact and as a consequence stated that the plaintiff-appellee was entitled to judgment in the sum of $61,300 with interest from July 8, 1974, and that said plaintiff was entitled to retain the $13,000 it had previously received. The court arrived at the figure of $61,300 by deducting from the sum of $80,000, the sum of $22,000 that was received in

mitigation with a subtraction of $3,300 for salesmens' commissions (JA 16-20).

POINT I

THE JUDGE SHOULD HAVE DISQUALIFIED HIMSELF ON THE BASIS OF THE LETTER TO HIM DATED MARCH 17, 1975 AND SENT THE CASE TO ANOTHER JUDGE FOR TRIAL.

The letter clearly infers that unless the Plaintiff is successful it will go into bankruptcy and be unable to pay its creditors. That is the sense of the statement and no other explanation of it can rationally be made. This information, uncorroborated, could not under any circumstances be imparted to a judge at the trial. It was extra-judicial and patently prejudicial. The ethics of so informing a judge is another matter. Upon receipt, without calling a conference or in any way according the defendant-appellant an opportunity to discuss the contents of the letter, the case was hastily set down for trial on a Good Friday. The appropriate motion was denied as "frivolous."

There are numerous cases in the various circuits dealing with disqualification of a judge and an analysis indicates that they are factual in essence. No one case can be cited which bears upon this factual circumstance.

The admonition of the Supreme Court of the United States are peculiarly apt.

In Re Murchison, 349 U.S. 133 (1955) 75 S. Ct. 623, 99 L.ED. 942 sets for the appropriate considerations. In that case it is stated at page 136:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.----This court has said, however, that every procedure which would offer a possible temptation to the average man as a judge----not to hold the balance, nice, clear and true between the State and the accused, denies the latter due process of law. Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749,758, 47 S.Ct. 437, 50 ALR 1243, such a stringent rule may sometimes bar for trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice. Offut v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11."

Mr. Justice Frankfurter, in explaining his decision not to participate in the appeal said in Public Utilities Commission v. Pollack, 343 U.S. 451 (1952 at page 467:

"When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe that they are operating, judges recuse themselves. They do not sit in judgment. The guidings consideration is that the administration of justice should reasonably appear to be disinterested as well as in fact"(emphasis added).

The principle is plain and the admonitions apply

with greater force to a civil non-jury case where the rulings and decisions of the trial judge are absolute.

POINT II

THE JUDGE, UNDER THE CIRCUMSTANCES, ABUSED HIS DISCRETION IN NOT GRANTING THE REQUEST FOR AN ADJOURNMENT OF THE TRIAL FROM MONDAY, APRIL 14, 1975 TO THURSDAY, APRIL 17, 1975 IN ORDER FOR THE OFFICERS OF THE APPELLANT TO BE PRESENT.

Defendants-appellant's request for an adjournment of this short non-jury trial from Monday to Thursday because of inability to have its witnesses present was denied. However, the court first ruled that the case for the plaintiff would proceed and the testimony of the witness JANICE STONE would be received upon her appearance in court on Wednesday or Thursday (JA 17). The judge stated that her testimony could not be more than an hour or two (JA 18). Objection to his procedure was made by the plaintiffs' attorney on a ground that was accepted by the judge and he gave the defendant one day to produce the witness. It would seem that every significant ruling was in the plaintiff's favor. The request to determine the travel itinerary of a witness to be called in rebuttal was ignored as well as the offer to submit the transcript of the trial to the judge in the event an adjournment was ordered. The rulings of the judge must be taken in the context of the letter set forth above. The insistence on a speedy trial in this brief, non-jury case is a clear abuse of discretion. No harm could be conceivable if the extremely short adjournment was granted. The issue

clearly presented here is the defendant's day in court. If another judge, after hearing the evidence, had decided in the plaintiff's favor on the merits, no appeal would be necessitated. The belief of counsel for the defendant that the application for an adjournment would be considered when the case was called for trial (JA 22) should have been given appropriate consideration. Under the circumstances set forth in the record herein, the question remains,"Why the rush?"

CONCLUSION

It is respectfully submitted that the judgment in favor of the plaintiff-appellee against the defendant-appellant be set aside and the case referred to a judge other than Judge Owen for a new trial.

Respectfully submitted,

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RAPHAEL P. KOENIG
Of Counsel

UNITED STATES COURT OF APPEALS
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SILVER CREATIONS,

Appellee,

against

CLASSIC MASTERPIECES, etc.,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.

That on the 23rd *day of* July *19*75 *at* 346 West 44th St., N.Y., N.Y.

deponent served the annexed Brief *upon*

Abraham E. Freedman

the **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said paper as the* *herein,*

Sworn to before me, this 23rd
day of July *19*75

Robert T. Brin

James A. Steele
Print name beneath signature
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977